# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Gillespie & Ors v Gillespie* [2013] QCA 99 |
| PARTIES: | **GEOFFREY BRUCE GILLESPIE**<br>(first appellant)<br>**WILLIAM BRUCE GILLESPIE**<br>(second appellant)<br>**MICHAEL PELDAN AND MORGAN LANE ATF THE ESTATE OF ANNETTE MIRIAM MAREE RODGERS (FORMERLY GREEN) (A BANKRUPT)**<br>(third appellant)<br>**v**<br>**GLORIA DAWN GILLESPIE**<br>(respondent) |
| FILE NO: | Appeal No 8193 of 2012<br>DC No 5 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | District Court at Mackay |
| DELIVERED ON: | 7 May 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 13 March 2013 |
| JUDGES: | Margaret McMurdo P, White JA and Margaret Wilson J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Appeal dismissed**<br>**2. Leave to the parties to make submissions as to the costs of the appeal in accordance with para 52 of Practice Direction No 3 of 2013.** |
| CATCHWORDS: | EQUITY – GENERAL PRINCIPLES – EQUITABLE DEFENCES – LACHES AND DELAY – WHAT CONSTITUTES – where the deceased had transferred certain real estate to his children, the appellants, upon his marriage to the respondent – where the transfers were found to be affected by unconscionable conduct and undue influence – where the respondent held the deceased's power of attorney at all material times from shortly after the transfers were executed – where the deceased and the respondent were informed of the transfers and warned that reversal would be 'expensive and protracted' – where the respondent made further enquiries about the possibility of having the transfers |

reversed – where the deceased continued to be unduly influenced, and later suffered from memory loss as a result of dementia – where the deceased executed two home-made wills providing for the respondent to pursue legal reversal of the transfer of one of the properties upon his death – where the respondent filed the claim on behalf of the deceased's estate over eight years after the transfer occurred – where the appellants claimed that the action was defeated by laches – where the trial judge dismissed the equitable defence of laches – where the appellants claimed that granting relief would cause prejudice due to the loss of evidence and acts performed in reliance upon the transfer – whether the claim should be barred by laches

*Limitation of Actions Act* 1974 (Qld), s 13

*Allcard v Skinner* (1887) 36 Ch D 145, considered
*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25, considered
*Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, cited
*Fisher v Brooker* [2009] 1 WLR 1764; [2009] UKHL 41, cited
*Fysh v Page* (1956) 96 CLR 233; [1956] HCA 13, cited
*Hourigan v Trustees Executors and Agency Co Ltd* (1934) 51 CLR 619; [1934] HCA 25, cited
*Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, cited
*Nowell v Palmer* (1993) 32 NSWLR 574; [1993] NSWCA 199, cited
*Orr v Ford* (1989) 167 CLR 316; [1989] HCA 4, cited

COUNSEL: D A Savage SC for the appellants
C C Heyworth-Smith for the respondent

SOLICITORS: SB Wright & Wright and Condie for the first and second appellants
Tucker & Cowen for the third appellant
Macrossan & Amiet for the respondent

[1] **MARGARET McMURDO P:** I agree with Margaret Wilson J's reasons for dismissing this appeal and with the orders proposed by her Honour.

[2] **WHITE JA:** I have read Margaret Wilson J's reasons for judgment in this appeal and agree with those reasons that the appeal should be dismissed.

[3] **MARGARET WILSON J**: This is an appeal against an order declaring that the appellants hold the property located at 18 Atkinson Street, Mackay on trust for the estate of the late Bruce George Gillespie ("Mr Gillespie") and consequential orders.

[4] Mr Gillespie died on 14 August 2010. The causes of death listed on his death certificate and their duration were myocardial infarction (one day), rectal cancer (nine months) and dementia (four years). He was survived by the respondent, who was his second wife, and the three adult children of his first marriage - Geoffrey Bruce

Gillespie ("Geoffrey"), William Bruce Gillespie ("William") and Annette Miriam Green ("Annette").

[5] Mr Gillespie married the respondent on 8 December 2002. At the time of the marriage, he was the registered owner of the property at 18 Atkinson Street ("the house") and two home units at 25 Byron Street, Mackay ("the home units"). Nine days later (on 17 December 2002), he transferred all his interest in the house and the home units to Geoffrey, William and Annette as tenants in common in equal shares by way of gift.

[6] This proceeding relates only to the house. It was brought by the respondent as administrator ad litem of Mr Gillespie's estate[1] against Geoffrey and William as first and second defendants and Annette's trustees in bankruptcy as third defendant. The defendants are the appellants before this Court.

[7] The trial judge found that the transfer of the house resulted from the undue influence of Geoffrey and that it was unconscionable. There is no appeal against those findings.

[8] The appellants contend that the trial judge erred in not finding that the claim was defeated by laches. They contend that they were not notified of any claim to impeach their title until after Mr Gillespie's death, and that almost nine years [sic][2] passed between the transfer and the commencement of this proceeding. They contend that Mr Gillespie acquiesced in the gift, and further, that the delay has resulted in prejudice to them and to others.

**What the trial judge said about laches**

[9] The trial judge dismissed laches in these terms –

> "[133] I accept there has been some delay in the case. However, I do not accept the [appellants] have suffered any prejudice by reason of the delay. The actions of [Mr Gillespie's] children took away from [Mr Gillespie] and from his wife the ability to prosecute an action. In early 2003 [Mr Gillespie] and the [respondent] were given the right advice that the taking of any action would be protracted and difficult. Nevertheless I find the [respondent] acted reasonably in seeking out who she could with her limited resources to try and prosecute her claim. I also consider there may have been a reluctance on the part of [Mr Gillespie] to engage in litigation against his children. The [respondent] has not sought any relief with respect to the home units or their value and therefore the [appellants] are not prejudiced by any alteration of their position."

[10] The appellant's counsel did not challenge any of the trial judge's findings of fact. Rather, he submitted that his Honour failed to advert to evidence relevant to laches, and that had he taken all of the relevant evidence into account, he ought to have found that the claim was defeated by laches.

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[1] The appellants contended before the trial judge that the respondent lacked standing because there had been no grant of probate. After his Honour reserved his decision, a Judge of the Supreme Court made an order appointing the respondent as administrator of the estate for the limited purpose of prosecuting this proceeding (Exhibit 39). The trial judge then allowed the respondent to amend her statement of claim by pleading her appointment as administrator. In his reasons for judgment his Honour opined that in those circumstances probate was not necessary (AR 588 para [119]).

[2] The claim was filed on 10 January 2011.

**The facts**

[11] The trial judge found the respondent to be a truthful and reliable witness and accepted her evidence. His Honour was less impressed with Geoffrey, and rejected some of his evidence. He found that William was in New South Wales at all material times, and that his knowledge of relevant matters was limited to what Geoffrey told him. Annette did not give evidence.

[12] At all times material to this proceeding Mr Gillespie resided in the house at 18 Atkinson Street, Mackay. He was a retired meat inspector. Geoffrey, who was a baker, and Annette lived in the Mackay district. William, a school principal, lived in New South Wales.

[13] Mr Gillespie was a widower when he met the respondent at a day-time dance at the local Masonic Hall in early 1998. They became friends and dancing partners. Then she had a number of short term relationships with other men until mid 2002. About that time she and Mr Gillespie resumed their friendship, and in August that year they decided to marry. He was almost 76 years of age and she was 62.

[14] In October 2002 Mr Gillespie gave Geoffrey an enduring power of attorney. He wanted Geoffrey to assume responsibility for the home units, dealing with the body corporate and the like. At the time Dr Perumal, a general practitioner, considered Mr Gillespie to be of sound mind, but with episodes of short term memory loss.

[15] Mr Gillespie and his first wife had told their children that they intended leaving their property to them when they died. When the relationship between Mr Gillespie and the respondent was rekindled in the second half of 2002, his children were concerned they might lose their inheritance. The trial judge found that Geoffrey, acting on behalf of William and Annette as well as on his own behalf, said something to his father about death duties, intending to motivate him to transfer the properties to them before his death, and that he told his father that it would be a good time to transfer the properties to them.

[16] Mr Gillespie and the respondent married in Mackay on 8 December that year without informing his children, and then immediately travelled to Brisbane, where they visited her daughter. Lured by a text message sent by Geoffrey that created a false sense of urgency, they returned to Mackay on 15 December.

[17] An appointment was made for Mr Gillespie to see a solicitor, Mr John Kidd at SB Wright & Wright and Condie on 17 December 2002. He was not previously a client of the firm, and, according to Geoffrey, Annette found the firm in the telephone book and arranged the appointment.

[18] The evening after returning to Mackay Mr Gillespie received a telephone call from Geoffrey. Mr Gillespie told the respondent that Geoffrey would be calling at 1.30 pm the next day to take him to a medical appointment. She did not know why.

[19] Geoffrey took his father to see Dr McIntosh and then to see Mr Kidd. Mr Gillespie returned home after about four hours. He did not tell the respondent where he had been.

[20] The trial judge accepted the evidence of Dr McIntosh, who was Mr Gillespie's general practitioner from 1994 to the early 2000's. On 17 December 2002 the solicitors asked

him to assess Mr Gillespie's competency for making legal decisions. Dr McIntosh knew that, some months before then, another doctor in the practice (Dr Perumal) had issued a handwritten note that Mr Gillespie was of sound mind. He knew that he had some short term memory problems, and said that he was starting to become more forgetful. He described it as the classic short term memory loss of a gradually developing dementia. After performing a brief mental assessment of Mr Gillespie, he was satisfied that his more complex understanding of issues was intact, and he certified that he was of sound mind, that he was capable of making decisions, and that he understood the implications of an enduring power of attorney.

[21] During his meeting with Mr Kidd, Mr Gillespie executed transfers of the house and the home units, an enduring power of attorney in favour of Geoffrey, and a will by which he appointed Geoffrey as his executor and left moneys he had in bank accounts and fixed deposits to the respondent and the residue of his estate to his three children.

[22] Mr Kidd did not take any notes of the conference.

[23] Mr Kidd recalled that Mr Gillespie told him he was concerned that he was or had been involved with a lady. He was concerned she might be "trying to rip him off". He had a vague recollection that Mr Gillespie said he had recently gone south with the lady, either to Brisbane or to somewhere south of Mackay, and that something profound had happened while he was down south. The trial judge found that these ideas had been implanted in Mr Gillespie's mind by Geoffrey, and that there was no basis for them.

[24] Mr Kidd recalled Mr Gillespie saying that he wanted to guard against doing something he did not really want to do at some future time when he did not know what he was doing, and that that was why he wanted to transfer some properties to his children. He recalled that Mr Gillespie was reasonably old, but quite clear and coherent. Mr Gillespie himself realised that he had some sort of problem in that he could not remember what had happened down south. Mr Kidd recalled getting a medical certificate, and said he had a general discussion with Mr Gillespie to assess his basic mental capacity to carry on a conversation. He was satisfied that Mr Gillespie had the capacity to execute the transfers, the power of attorney and the will. They were all executed at the same time, and he was a witness to Mr Gillespie's signature.

[25] There were some aspects of the meeting Mr Kidd could not specifically recall. He gave evidence of what he would have done, based on his professional experience and ingrained practices. He said he would have spoken with Mr Gillespie in the absence of Geoffrey and "given him a bit of a grilling as to whether he really wanted to do this himself or whether he was being influenced by somebody else to do it." He would have told Mr Gillespie –

> "You realise if you do this, there's no going back. You can't transfer a property to somebody and then say oops, I made a mistake I want you to transfer that property back."

Mr Kidd said that, had he formed the view Mr Gillespie was being unduly influenced, he would have "bushed him".

[26] The trial judge accepted Mr Kidd's evidence. His Honour said –

> "[111] I consider Mr Kidd was honestly trying to remember what happened when he saw [Mr Gillespie] and [Mr Gillespie] executed the transfer of the properties into the names of the

> children. He was at a disadvantage in that he was trying to recall events that occurred about 10 years ago and he did not make notes at the time. However, I see no reason not to accept his evidence. In the circumstances I accept his evidence. That does not mean I accept that because [Mr Gillespie] said to Mr Kidd he was seeing him because some lady (presumably the [respondent]) may be trying to rip him off and because of something that happened down South [Mr Gillespie] executed the transfer as a result of the free exercise of his independent will.
>
> …
>
> [128] …I do not accept the advice Mr Kidd gave [Mr Gillespie] overcame Geoffrey's undue influence over [Mr Gillespie]."

[27] The trial judge did not accept that when the transfer of the house was executed the children agreed that Mr Gillespie could live in the house until he died.

[28] Mr Gillespie did not tell the respondent what he had done. The next day he handwrote and signed a document in these terms –

> "
>
> 8/12/02
>
> I Bruce George Gillespie wish to revoke authority for my son Geoffrey Bruce Gillespie to act as Power of Attorney over my affairs. I appreciate your assistance to this date. Thanking you.
>
> Signed Bruce Gillespie."

The circumstances in which he did so were not explained in the evidence.

[29] On 20 December 2002 Mr Gillespie gave the respondent approximately $37,000. He did not tell his children about doing so. She used the money to buy out the interest of a former partner in a home unit they had bought together, to reimburse the former partner for money he had expended and to discharge credit card fees.

[30] The respondent seems to have had an inkling that something was going on, although she did not actually learn of the transfers until at least 31 January 2003. Soon after the transfers were executed, Annette rang her and said words to the effect that she (the respondent) was living in her (Annette's) house.

[31] The respondent and Mr Gillespie consulted Mr Andrew Coates, a solicitor at McKays, on 15 January 2003, when he executed an enduring power of attorney in her favour. She said that it was a joint decision to see the solicitor.

> "And was it in the context of, look, we're married now, we should – I should get a power of attorney for you? What was the context of the discussion?-- We discussed managing our own affairs and Bruce intimated that he – he couldn't really be bothered doing bookwork and stuff at that stage and he asked me if I'd manage them for him and so that was – as we'd given Geoffrey a revocation of the power of attorney, presumably, for the 23rd of October document, there was no-one that I'm – I was – I was aware of who was acting in that capacity, so----- ."

While they were with Mr Coates, they "filled in a form requesting any documents from Wright & Wright and Condie".

[32] On 31 January 2003 McKays wrote to Mr Gillespie confirming the execution of the power of attorney. They continued –

> "We also enclose a letter received from SB Wright Wright & Condie, the contents of which are self explanatory. We understand that you believed you have made a will with them but the account suggests that you actually gifted property away. Should you wish us to do anything further would you please advise."

By the time of the trial, McKays' file had been destroyed.

[33] The respondent gave evidence of talking to Mr Gillespie about the transfer of the properties to his children. In evidence in chief she said that he just shrugged his shoulders. In cross-examination she said that when she asked him why he had transferred the properties to his children, he replied that Geoffrey had told him it was to avoid death duties. She went back to Mr Coates and asked if there was any way they could reverse the transaction. Mr Coates replied that they possibly could do so, but it would be very expensive and very protracted. At the time she did not have any available funds to do so.

[34] According to the respondent, for quite some time after that, Mr Gillespie attended to his own banking and personal shopping on Friday mornings while she stayed home.

[35] The respondent sought assistance from Legal Aid and the Women's Legal Centre. It is not clear when she did so. In any event, they told her she would have to engage her own solicitor. Sometime in 2003 she spoke with Mr Paul McDonald, whom she described as a solicitor who acted for people who had insurance with Australian Pensioners Insurance. He told her there were no death duties in Queensland. He told her that she would need "the expertise of a legal man" if she were to have the transfers reversed. She did not tell Mr Gillespie what Mr McDonald had said about death duties because she did not want to embarrass him.

[36] The respondent and Mr Gillespie both received benefits from Centrelink. Her former partner continued to live in the home unit they had previously shared, paying her $75 per week rent. The respondent kept up payments to the bank which had a mortgage over the unit, as well as paying rates and insurance premiums in relation to it. In 2003 she received a modest inheritance which she used in further discharge of the mortgage. In November 2006 she transferred that home unit to her daughter by way of gift.

[37] Mr Gillespie did not seek legal advice about reversing the transfers. The respondent gave the following evidence in cross-examination, without identifying the time period to which it related –

> "Now what about Bruce, did – were you present when Bruce sought legal advice about recovering any of those properties?-- He didn't seek legal advice.
>
> No?-- No. Because by then he had lost – because of his dementia of the Alzheimer's type, he had lost a considerable amount of his drive and his decision making. He didn't make decisions. He'd usually say, 'You do what you think best, love.'
>
> Mmm?-- And he'd just shrug his shoulders, so he – he didn't take on the responsibility at that stage particularly, but when Bruce said 'no', like when I asked him if he wanted to go and live in a unit,

> once Bruce said 'no', he was a man of authority, and if he said 'no' I did not in any way question or argue with my husband. I respected him-----
>
> Sure. But as----- ?-- -----and his decisions.
>
> But his dementia deteriorated, didn't it; it got worse? -- At the very end it did when he when he – when he was – after his cancer operation, yes.
>
> But even in 2005 and 2006 his condition had deteriorated quite considerably, hadn't it?-- No, no. His memory was not good. He was on Aricept, and he was by now on the full strength Aricept after a six month period with the half strength, and when we went to Dr Futter, the psychiatrist, he said he was so pleased with his progress he'd – his – his score – his mental score had been gone further – been raised further than any other client, and he was very delighted with him."

[38] In early March 2003 the respondent contacted the Mackay Community Health Centre and expressed concern that Mr Gillespie may have dementia, as she had noticed some deterioration in his memory, particularly his short term memory. He was referred to a psychologist, Ms Jane Murdoch, for psychometric testing. Ms Murdoch spoke with the respondent and Dr McIntosh before examining Mr Gillespie. She also spoke with Geoffrey. In her opinion Mr Gillespie's general cognitive abilities were intact and she found no evidence of disturbance to executive functions. Nevertheless, there was a clear deficit in verbal and visual memory, which was consistent with self reports of memory problems over the preceding 12 – 18 months, reports from his family and general practitioner, and her own observations. She encouraged him to seek medical advice about the possibility of trialling the drug Aricept to determine if the rate of deterioration in his memory could be slowed. The trial judge accepted Ms Murdoch's evidence.

[39] The respondent was in Vanuatu visiting her daughter between 25 April and 24 July 2003. When she left Australia, the duration of her intended stay in Vanuatu was indefinite. She said Mr Gillespie agreed to her going and allowed her to withdraw money from his bank account to pay for her fare. They corresponded while she was away. Unbeknown to her, while she was away Mr Gillespie reported her to the police as a missing person and told Centrelink that she had left him.

[40] According to Geoffrey, while the respondent was away, his father asked him to take over the management of his accounts, saying that he had retired and should not have to worry about those sorts of things. Geoffrey said –

> "I – I informed him that we would have to go through the whole thing all over again and go to the solicitors, go to the doctor's and get it done again.
>
> He just - he shrugged his shoulders and said, 'Yeah, okay'."

Geoffrey said he set the necessary steps in motion. He lived about half an hour's journey from his father, and so he had his father's mail redirected to him. He obtained internet access to his father's bank accounts. He paid tax bills for his father, and confirmed with Centrelink that all was in order. Rent from the home units was paid into an account for the upkeep of the house and the home units.

[41] On 16 July 2003 Dr McIntosh again assessed Mr Gillespie's capacity to sign legal documents. Mr Gillespie stated openly that he wanted his son to take over all his financial affairs, and that he understood that would give his son control over everything he owned. He said to Dr McIntosh –

> "If I can't trust my son, who can I trust?"

Dr McIntosh's assessment of his capacity and understanding had not changed from December 2002. His score on the memory questionnaire was a little better than it had been.

[42] Unbeknown to the respondent, on 17 July 2003 Mr Gillespie executed another enduring power of attorney in favour of Geoffrey, and a will appointing Geoffrey as his executor and leaving his entire estate to his children. These were prepared by Mr Andrew Busch, a solicitor at SB Wright & Wright and Condie. The will contained the following declaration –

> "I declare that I have specifically excluded [the respondent] from any benefit under this my Will as:
>
> (a) She left me shortly after we were married;
> (b) She has had no contact with me since leaving me; and
> (c) She took money from my bank account."

The trial judge found that these ideas were induced in Mr Gillespie by Geoffrey, and that there was no basis for them.

[43] After the respondent's return from Vanuatu, Geoffrey saw his father less often – every two to three weeks, usually when the respondent was not home.

[44] On 20 November 2003 the respondent took Mr Gillespie to Dr McIntosh for another assessment. Dr McIntosh considered that there was no obvious overall change in his condition, and certified that he was able to understand the implications of signing an enduring power of attorney and that he was of sound mind to make such a decision.

[45] The next day Mr Gillespie and the respondent went to the Public Trustee's office, where they spoke with Ms Kim Luxford about the preparation of a new will, and an enduring power of attorney. According to the respondent, Mr Gillespie told Ms Luxford that he wanted to leave the house to her. Ms Luxford replied –

> "I'm sorry, Mr Gillespie, you've already gifted it to your children, it's too late."

Mr Gillespie did not say anything in response, but just shrugged his shoulders again.

[46] Mr Gillespie executed a new will, appointing the Public Trustee as his executor, and leaving his whole estate to the respondent, or if that gift failed, to his children. He also executed an enduring power of attorney in favour of the respondent. A few days later he executed a revocation of the powers of attorney which he had executed on 17 December 2002 and 17 July 2003 in favour of Geoffrey.

[47] In February 2004 Dr Graham Futter, a psychiatrist and the Director of the Mackay Integrated Mental Health Service, assessed Mr Gillespie's dementia. He reported to Dr McIntosh –

> "[Mr Gillespie] exhibits fairly global deterioration Cognitively with more deterioration in the area of memory. He has features consistent with a diagnosis of Alzheimers Disorders.

> [Mr Gillespie's] MMSE[3] was 22 out of 30. I have arranged a script for Aricept[4] 5mg nocte. I will review [Mr Gillespie] in 3 months to assess his response to the medication."

[48] On 29 June 2004 Dr Futter wrote to Dr McIntosh –

> "When I saw [Mr Gillespie] and his wife on 21 June 2004 they were both positive about improvements in [his] memory over the last four months.
> [Mr Gillespie] scored 27 out of 30 on his MMSE, which is an improvement of five points since February.
> …."

He issued a prescription for Aricept 10 mg nocte.

[49] Mr Gillespie executed two home-made wills - the first on 23 October 2005 and the other on 3 April 2006. The trial judge found that he had testamentary capacity each time.

[50] In cross-examination the respondent agreed that in 2005 she well understood that her husband was suffering from Alzheimers. His condition fluctuated from day to day. His short term memory was poor at best, and it did not improve with medication. His handwriting had deteriorated. If she asked him about anything, he would shrug his shoulders and say –

> "It's up to you, love, whatever you think is best."

She said –

> "And I was acting in his best interests as his power of attorney, which is what supposed to do [sic]."

She believed that the power of attorney gave her authority to draft the 2005 will because it was ultimately in her husband's best interests.

[51] The October 2005 will was contained in a printed will form filled out in the respondent's handwriting. She said they drafted it together at the dining table. Mr Gillespie was quite cool, calm and collected; it was probably one of his better days.

> "We didn't sit down and do it all at once. We did it a bit at a time, 'cause that – when you have a poor memory, your – also – powers of concentration are considerably reduced, so –"

By the terms of that will the respondent was to be the executor and sole beneficiary of Mr Gillespie's estate. He gave the following reason for excluding his children from his bounty –

> "As my children, Annette, Geoffrey and William, – who have been the recipients of the fruit of my many years of toil over many years – have taken unfair advantage and trusted that I would have no recollection of their unfair advantage of my memory loss I believe they have no further right to any of my possessions, including real estate, vehicles, household goods, money or anything else owned by, or owing to me."

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3 Mini mental state examination.

4 A drug used to treat Alzheimer's disease.

He directed the respondent to seek repayment of loans he had made to family members and the reversal of the transfer of the house –

> "I direct [the respondent] to seek repayment of all loans (interest-free) I have made to any family member, specifically to Annette (nee Gillespie) and her then husband William of $59,200. I direct [the respondent] to pursue legal reversal of the signing over to my children – free of monetary [re-imbursement] – of my home at 18 Atkinson St. My children may retain ownership of units 3 and 4 of 25 Byron Str, including contents, plus … any other of my possessions including cash, which they have removed – with or without my permission or knowledge – from my property."

He continued –

> "I also acknowledge the care, concern and protection [the respondent] has provided to me, and the suffering she has endured due to threats, disrespect intimidation, unlawful use and damage to her vehicles and goods, also cruelty to me, and her pet dog's 'disappearance'. I did not appreciate or deserve to be pushed down the steps of 18 Atkinson St by William Rodgers in the [presence] of Annette. May God forgive you all – I do."

[52] On 16 March 2006 Mr Gillespie forgave a debt of $58,000 owing to him by his daughter Annette and William Henry Rodgers. Annette took him to the Mackay Courthouse, where Beverley Jean Vella was doing volunteer work as a Justice of the Peace. Mrs Vella witnessed Mr Gillespie's execution of the forgiveness of debt. The trial judge was impressed by Mrs Vella, whom he described as truly an independent witness and as truthful and reliable. His Honour accepted her evidence that Mr Gillespie appeared lucid and normal. She asked him whether he was happy releasing the debt, and he replied that he was. She kept a log book in which she recorded that he was "under no duress from the daughter" and "fully understood" and "appeared fully lucid".

[53] Thinking that Annette was up to something, the respondent took the initiative in having Mr Gillespie execute the second homemade will in April 2006. She said that it was prepared in the same way as the October 2005 will. It was in the same terms.

[54] The execution of both wills was witnessed by Mr Albert Dillon, who was an elderly and longstanding friend of Mr Gillespie, and Mr Rhys Lyell, who was a young lodger in the house. Mr Dillon gave evidence. The trial judge considered him to be an honest witness, and thought that he could rely on his observations of Mr Gillespie up to and including 3 April 2006 when the second will was executed. Mr Dillon visited Mr Gillespie two or three times a week, usually for two or three hours. He agreed that Mr Gillespie seemed to have problems with his memory, but answered "No" when asked whether he observed even the slightest hint that he might have been suffering from Alzheimer's.

[55] Annette got into financial difficulty, and on 2 June 2006 she filed an application against her brothers for the appointment of statutory trustees for the sale of the house and the home units. Geoffrey and William opposed the application. Geoffrey told his father and the respondent about the application. His father was upset, but Geoffrey assured him he should not worry about staying in the house as "it [would] be over [his] dead bloody body." The proceedings were eventually settled. Mr Gillespie was not

a party to the litigation or to the settlement. The two units were sold, and from the proceeds of sale $30,000 was set aside to pay for maintenance, rates and insurance on the house while their father resided there. They agreed that the house would not be sold while their father resided there.

[56] Annette subsequently became bankrupt, but the evidence did not disclose precisely when.

[57] Geoffrey continued to visit Mr Gillespie until 2008 or 2009, when he "found it painful going round there." He described his father's health in the period leading up to the cessation of contact as "not very good". He recalled taking his wife and children to visit his father on one occasion when his father had no idea who the children were.[5]

[58] William could not recall the date of his last visit to Mr Gillespie; he thought it may have been in 2007. He observed a "huge change" in his father's condition. He was very confused, and did not know who was Geoffrey and who was William. He was not walking.[6]

[59] Before the home units were sold, the income generated from them was used to meet outgoings on the house. On at least a couple of occasions Geoffrey paid the bills and subsequently reimbursed himself when funds became available. After the home units were sold, outgoings on the house were met out of the $30,000 until that fund was exhausted. Then Geoffrey stepped into the breach meeting expenses from his own funds. There was no quantification of what he paid beyond his having paid part of a bill for $18,000 for painting the house in 2009.

[60] According to the respondent in the period between 2006 and his death in August 2010 Mr Gillespie's mind was fine, although his memory was "shot", and he remained an avid reader. According to his death certificate, however, he suffered from dementia in the last four years of his life. In early 2010 he had a bowel cancer operation in Brisbane where he was hospitalised for seven weeks. During that time she stayed with her daughter in Brisbane but for short period in New Zealand visiting relatives. Mr Gillespie was transferred to a hospital in Mackay. The respondent tried to return to the house, but found that the locks had been changed. Eventually she regained entry and took her husband home, where she cared for him over his last three months.

[61] Immediately after Mr Gillespie's death his children demanded possession of the house. There was a tenancy dispute in QCAT, and the respondent commenced the present proceeding.

[62] In September 2011 Annette's interest in the house was transferred to her trustees in bankruptcy.[7]

**Submissions**

[63] At trial the third defendant was separately represented from the first and second defendants. However, their pleadings were relevantly in the same terms and their submissions on laches were to the same effect.

[64] The defendants pleaded – [8]

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5 AR 253.

6 AR 288-289.

7 Exhibit 1 document 9.

8 Further Amended Defence of the First and Second Defendants filed by leave 2 April 2012 (AR 459). See also Amended Defence of the Third Defendant filed by leave 3 April 2012 paras 9-15 (AR 465).

"Acquiescence, Laches and Delay

11. The matters complained of by the Plaintiff in paragraphs 7 to 14 of the amended statement of claim as amounting to undue influence or an unconscionable bargain occurred in December 2002.

12. Between February 2003 and the commencement of these proceedings, the Plaintiff was aware that Bruce had transferred the real property located at 3/25 Byron Street, Mackay and 4/25 Byron Street, Mackay (together 'the Byron Street Properties') together with the property located at 18 Atkinson Street, Mackay ('the Atkinson Street Property') to the First, Second and Third Defendants in equal shares.

Particulars

The First and Second Defendants rely on the facts matters and circumstances alleged by the Plaintiff in paragraph 8 of the Statement of Claim dated 10 January 2011.

13. Notwithstanding the Plaintiff's and Bruce's knowledge, the Plaintiff and Bruce allowed the First, Second and Third Defendants to:
    (i) to sell the Byron Street Properties;
    (ii) keep the proceeds of sale of the Byron Street Properties; and
    (iii) to remain as the registered proprietors of the Atkinson Street Property.

14. The Plaintiff and Bruce:
    (i) did not [sic] nothing to assert any rights the Plaintiff or Bruce might have in relation to the Atkinson Street Property (if any, which is denied);
    (ii) did nothing to seek to enforce the alleged rights over the Atkinson Street Property.

15. The delay in asserting rights was substantial being from on or about 17 December 2002 until on or about the commencement of these proceedings, despite allegedly holding a power of attorney since 15 January 2003.

16. The delay from the time of the said knowledge first being acquired until the time of the commencement of these proceedings constituted laches and acquiescence.

17. In the premises, the Plaintiff is precluded by her laches from bringing and maintaining the action for undue influence and unconscionable bargain and should not be granted the relief sought."

[65] The respondent pleaded in reply – [9]

[9] Amended Reply to the Further Amended Defence of the First and Second Defendants filed 26 April 2012 (AR 468-470). See also Amended Reply to the Defence of the Third Defendant filed 16 April 2012 paras 2-7 (AR 472 – 475).

"2. As to paragraph 11 of the Amended Defence, the Plaintiff admits that the matters complained of by the Plaintiff in paragraphs 7 to 14 of the Further Amended Statement of Claim occurred in December of 2002.

3. As to paragraph 12 of the Amended Defence, the Plaintiff admits that the Plaintiff became aware that Bruce Gillespie transferred the three properties owned by him to the First, Second and Third Defendants in February of 2003.

4. As to paragraph 13 of the Amended Defence, the Plaintiff:

   (a) admits the First, Second and Third Defendants sold Unit 4, 25 Byron Street for $196,000.00 in July of 2007 and Unit 3, 25 Byron Street for $190,000.00 in August of 2007 and kept the proceeds of sale of the Byron Street properties;

   (b) says that:
      a) the First, Second and Third Defendants entered into an agreement in 2007, one provision of which required the sale of the units;
      b) Bruce Gillespie was not a party to the agreement and was not advised by the Defendants that the agreement was to be, or had been, entered into; and
      c) Bruce Gillespie was not informed that the units were to be sold;

   (c) denies, for the reason pleaded in sub-paragraph (b) above, the allegations of fact in paragraph 13 of the Amended Defence otherwise.

5. As to paragraph 14 of the Amended Defence, the Plaintiff denies that she and her late husband Bruce had done nothing to assert any rights in relation to the Atkinson Street property and/or have done nothing to enforce rights over the Atkinson Street property as:

   (a) the Plaintiff and Bruce sought advice from McKays solicitors and were advised that litigation could be commenced but that it would be costly and protracted.

   (b) the Plaintiff sought advice from the Queensland Legal Aid office and was advised that no legal assistance could be given with respect to an action to recover real property.

   (c) the Plaintiff sought advice from Mr Paul McDonald who provided free legal advice to APIA insurance customers who advised that he was not able to assist other than by providing oral advice.

   (d) the Plaintiff sought advice from the Women's Legal Centre in Townsville and was given advice that she would need to consult a private solicitor and be in a position to fund payment to the private solicitor to conduct any action for the recovery of possession of the property at 18 Atkinson Street.

(e) Bruce Gillespie completed a Will dated 23rd October 2005 in which he directed the Plaintiff to pursue legal reversal of the signing over to the children free of monetary reimbursement of his home at 18 Atkinson Street, Mackay.

(f) Bruce Gillespie declared in correspondence to the Guardianship and Administration Tribunal dated the 16th February 2006 following a complaint made by Annette Marie Miriam Rodgers:

'I wish to rescind the gifting of the properties (18 Atkinson Street) executed on 17-12-2002 to
Annette Miriam Maree Rodgers
William Bruce Gillespie
Geoffrey Bruce Gillespie

I state that I believe that I signed the transfer of ownership to my children without proper due consultation or independent legal advice, with undue haste after my marriage and return to Mackay (at my children's urging less they report me as a missing person) on 15-12-2002'.

(g) Bruce Gillespie completed a Will dated 3rd April 2006 in which he directed the Plaintiff to pursue legal reversal of the signing over to my children free of monetary reimbursement of his home at 18 Atkinson Street, Mackay.

(h) the Plaintiff sought advice from Mackay Regional Legal Centre which resulted in the issuing of these proceedings.

6. As to paragraph 15 of the Amended Defence, the Plaintiff denies that the delay in commencing these proceedings to assert the right to recover the property at 18 Atkinson Street, despite her holding a Power of Attorney dated the 15th January 2003 and a subsequent Power of Attorney dated the 21st November 2003 has been substantial as the action to recover the land at 18 Atkinson Street could have been brought for up to 12 years from the date on which the right of action accrued to Bruce Gillespie on the 17th December 2002.

7. As to paragraphs 16 and 17 of the Amended Defence, the Plaintiff denies the delay in commencement of these proceedings constitutes laches and acquiescence and precludes her from bringing and maintaining the action for undue influence and unconscionable bargain as:

(a) section 13 of the *Limitation*s (sic) of *Actions Act* 1974 permits an action for the recovery of land to be commenced for up to 12 years from the date on which the right of action accrued to a person.

(b) Bruce Gillespie, as a result of his physical and mental state in the years subsequent to the 17th December 2002, suffered a loss of confidence and suffered from short term memory deficits and was incapable of instructing solicitors to

conduct an action for the recovery of his land and did not have the financial capacity to engage solicitors as his principal income earning assets Units 3 and 4, 25 Byron Street, Mackay, were in the control of the Defendants.

(c) The Defendants have not been prejudiced by the delay in the commencement of the proceedings and have in fact benefited by the passage of time as they have had the use of the sale proceeds of the units since 2007."

[66] The submissions at trial departed somewhat from the pleadings. Counsel for the first and second appellants and the solicitor for the third appellant submitted that at the very least –

(a) the transaction upon which relief was claimed occurred approximately 10 years previously;

(b) the key witness, Mr Gillespie, who would have been able to shed light on his intentions and conversations and state of mind at the time, had died;

(c) the appellants had changed their position by utilising their own money to perform maintenance on the property;

(d) Mr Kidd, the solicitor who gave Mr Gillespie advice, was unable to give positive evidence as to the advice he gave;

(e) The file of McKays Solicitors, who acted for the respondent and Mr Gillespie for a time had been destroyed.[10]

*Submissions on behalf of the appellants*

[67] On appeal senior counsel for the appellants submitted that much of the evidence at trial was unhelpfully general. He did not challenge the trial judge's findings of fact, but submitted that when all of the evidence was considered, his Honour ought to have applied the doctrine of laches and dismissed the claim.

[68] Senior counsel for the appellants submitted that both the respondent and Mr Gillespie must have been aware of his right to have the transfers reversed in 2003 – Mr Gillespie because the general matter of the transfers was raised with him by the respondent and the respondent because she obtained Mr Coates' advice after receiving the letter of 31 January 2003. He conceded that they may not have had the money to embark on litigation, but submitted that either Mr Gillespie or the respondent, who held her husband's enduring power of attorney at all times from mid January 2003, should have at least written a letter or otherwise given notice challenging the transfer of the house and claiming the right to have it reversed. He criticised the trial judge for not appreciating that not only did they not commence a legal proceeding while Mr Gillespie was alive – they stood on their rights in silence.

[69] Senior counsel for the appellants submitted that, whatever Mr Gillespie's view about the transfers, the respondent sought advice about setting them aside – not only from Mr Coates, but also from Mr Paul McDonald, Legal Aid and the Women's Legal Centre. He submitted that the necessary inference from the homemade wills executed in 2005 and 2006 was the Mr Gillespie knew of his right to have the transfers reversed.

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[10] AR 502-503, 519-520.

He differentiated between the home units and the house, knowing which claim he wished to make and which he did not wish to make. He made a deliberate decision not to prosecute a claim to have the transfer of the house reversed during his lifetime – that is, while the person who could give evidence of why things were done (himself) was alive. The respondent (his attorney) could have sued, and the evidence did not go so far as establishing that he would have stopped her from doing so. Instead, they stood on their rights in silence.

[70] Further, senior counsel for the appellants submitted that the appellants and third parties had been prejudiced by the delay. Evidence which might have cast a different complexion on the matter had been lost: in particular, Mr Gillespie had died without anyone having taken a statement from him at any time, and Mr Kidd's recollection of his conference with Mr Gillespie in December 2002 had diminished with the passing of time. Annette's application for the appointment of statutory trustees for the sale of the house and the home units had been compromised in ignorance of the claim. The children changed their positions by selling the income producing property and setting aside some of the proceeds of sale for the maintenance of the house. Geoffrey had spent some of his own money on the maintenance of the house. By the time the proceeding was brought Annette had become bankrupt and her creditors' rights were affected by the reversal of her interest in the house.

*Submissions on behalf of the respondent*

[71] Counsel for the respondent submitted that in considering laches it was always necessary to consider the length of the delay, the nature of the acts done during the interval, the nature of the right claimed and the property in which it was claimed.[11] She submitted that laches is applicable in a case of undue influence only once the influence has ceased, and that by parity of reasoning, in a case of unconscionable conduct, it is applicable only when the circumstances giving rise to the unconscionability have ceased. In the present case, she submitted, the appellants' influence over Mr Gillespie and the circumstances giving rise to the finding of unconscionability did not cease until he was suffering from deterioration in his memory and cognitive function due to dementia of the Alzheimer's type; and because of this decline, it could equally be said that it never ceased.

[72] In oral submissions counsel for the respondent focussed on the evidence Mr Gillespie might have been expected to give had the proceeding been brought earlier, which was relevant to whether the appellants were prejudiced by his not being available to give evidence at the trial. She submitted that it should be inferred from McKays' letter of 31 January 2003 that even then Mr Gillespie did not remember that the transfers had taken place, and lacked the ability to give cogent evidence. When the respondent raised the transfers with him, he just shrugged his shoulders. The 2005 and 2006 wills showed that he had some knowledge that he had a right to have the transfers reversed, a right that might or might not be enforceable against his children. Importantly, the wills showed what would have been the complexion of Mr Gillespie's evidence – that he believed his children had taken unfair advantage of him and that they trusted he would have no memory of their doing so. Evidence of that sort would not have helped the appellants resist the charges of undue influence and unconscionable conduct. By 2007, if not before, Mr Gillespie was not capable of himself bringing an action to set aside the transfers, and he would not have been able to provide any useful evidence in that regard.

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[11] RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (2002, 4th ed) at [36-030] citing *Boyns v Lackey* (1958) 58 SR (NSW) 395.

[73] Counsel for the respondent responded to her opponent's submissions that the respondent ought to have done something at least to assert Mr Gillespie's entitlement to have the transfers reversed. She submitted that all the respondent really knew was that the children had not provided any money for the transfers. She did not know anything else about the circumstances in which they were executed until after the proceeding commenced. She was advised that legal action to reverse the transfers would be very expensive and protracted. She was not advised that at least a letter should be sent notifying the children of a claim to set the transfers aside. She was elderly and of limited means, caring for a man with advancing Alzheimers disease who did not want to do anything about the transfers himself. Counsel conceded that, from when Mr Gillespie became incapacitated from starting an action himself, the respondent's knowledge might be sheeted home to him.

[74] Counsel for the respondent submitted that the appellants ought not be allowed to rely on having ordered their affairs on the basis of their ownership of the properties and their having used their own funds for outgoings and maintenance of the house, as these matters had not been pleaded and accordingly, there had not been relevant disclosure. She submitted that there was no evidence that any of Annette's creditors altered their affairs on the basis of her property ownership, and no evidence that Annette altered her own affairs to her detriment on the basis of her property ownership. There was no evidence that William spent any of his own money on the house, and no evidence that he altered his affairs on the basis of his property ownership. There was no evidence that Geoffrey altered his affairs on the basis he was the owner of the properties in the absolute sense.

[75] The trial judge accepted Mr Kidd's evidence based on his actual recollection and that based on what he would have done in light of his experience and standard practices. Mr Kidd was not asked if his recollection would have been better at any earlier time. Counsel for the respondent submitted that his Honour took his evidence at its highest, and accepted that had he formed the view that Mr Gillespie was being unduly influenced, he would have "bushed" him. She submitted that in the circumstances it was difficult to see that Mr Kidd's evidence would have cast a different complexion on the case had it been given at an earlier time.

[76] When the equities were balanced, counsel for the respondent submitted, the claim of laches was rightly dismissed.

**Discussion**

[77] The respondent's claim, which was based on undue influence and unconscionable conduct, was purely equitable.

[78] As Lord Blackburn said in *Erlanger v New Sombrero Phosphate Co* – [12]

> "… a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by."

[79] Laches is an equitable doctrine, under which delay can bar a claim to equitable relief.[13] Deane J (with whom Mason CJ agreed) observed in *Orr v Ford*[14] that the ultimate test is that enunciated by the Privy Council in *Lindsay Petroleum Co v Hurd* – [15]

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12 (1878) 3 App Cas 1218 at 1279.

13 *Fisher v Brooker* [2009] 1 WLR 1764 at 1780 per Lord Neuberger of Abbotsbury.

14 (1989) 167 CLR 316 at 341.

15 (1874) 5 PC 221 at 239-240.

> "… whether the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable 'to place him if the remedy were afterwards to be asserted': see *Erlanger v New Sombrero Phosphate Co*,[16] and also, per Rich J, *Hourigan*.[17]"

[80] The learned authors of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*[18] posit that there are two types of laches –

(i) delay with acquiescence, where prejudice to others need not be shown; and

(ii) more commonly, delay with prejudice to others.

However, in *Fisher v Brooker*[19] Lord Neuberger said –

> "Although I would not suggest that it is an immutable requirement, some sort of detrimental reliance is usually an essential ingredient of laches, in my opinion. In *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 239-240, Lord Selborne LC, giving the opinion of the Board, said that laches applied where 'it would be practically unjust to give a remedy', and that, in every case where a defence 'is founded upon mere delay… the validity of that defence must be tried upon principles substantially equitable'. He went on to state that what had to be considered were 'the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'."

[81] Trying the validity of the defence on equitable principles involves the balancing of equities. In *Erlanger v New Sombrero Phosphate Co*[20] Lord Blackburn said –

> "…it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

And in *Fysh v Page*[21] Dixon CJ, Webb and Kitto JJ said –

> "If a plaintiff establishes prima-facie grounds for relief the question whether he is defeated by delay must itself be governed by the kind of considerations upon which the principles of equity proceed. If the delay means that to grant relief would place the party whose title might otherwise be voidable on equitable grounds in an unreasonable situation, or if, because of change of circumstances, it would give the party claiming relief an unjust advantage or would impose an unfair prejudice on the opposite party, these are matters which may suffice to answer the prima-facie grounds for relief. See *Lindsay Petroleum Co v Hurd* and the observation in Lord Blackburn's speech in *Erlanger v New Sombrero Phosphate Co*." *(citations omitted.)*

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16 (1878) 3 App Cas 1218 at 1279.

17 *Hourigan v Trustees Executors and Agency Co Ltd* (1934) 51 CLR 619 at 629-630.

18 (2002, 4th ed) at [36-005].

19 [2009] 1 WLR 1764 at 1781.

20 (1878) 3 App Cas 1218 at 1279-1280.

21 (1956) 96 CLR 233 at 243-244.

[82] The transfer of the house was effected on 17 December 2002. Mr Gillespie died on 14 August 2010. This proceeding was commenced a little over eight years after the transfer occurred, on 10 January 2011. In *Nowell v Palmer*[22] Mahoney JA (with whom Meagher and Handley JJA agreed) said –

> "In assessing delay, for this and other purposes in the law, it is important to understand what is the true meaning of delay. Delay is the period of time beyond that within which, in ordinary expectation, the act in question should have been done. In quantifying delay it is necessary to determine what time is ordinarily to be allowed for the doing of that which is in question. It is only the time beyond this which, in the strict sense, represents delay." *(reference omitted.)*

[83] In *Allcard v Skinner*[23] the plaintiff gave property to an Anglican religious order of which she was a member. She subsequently left that order and joined a Roman Catholic order. Six years after leaving the Anglican order, she commenced an action against its principal to recover some of the property on the ground of undue influence. By majority, the Court of Appeal held that her claim was defeated by laches. Lindley LJ said that a donor seeking to invalidate a gift on the ground of undue influence ought to seek relief within a reasonable time after the removal of the influence under which the gift was made. His Lordship continued – [24]

> "If he does not the inference is strong, and if the lapse of time is long enough the inference becomes inevitable and conclusive, that the donor is content not to call the gift in question, or, in other words, that he elects not to avoid it, or, what is the same thing in effect, that he ratifies and confirms it.
>
> …
>
> …in the first place, I am not satisfied that the Plaintiff did not know that it was at least questionable whether the Defendant could retain the Plaintiff's money if she insisted on having it back. In the next place, if the Plaintiff did not know her rights, her ignorance was simply the result of her own resolution not to inquire into them. She knew all the facts; she was in communication with her present solicitor [the year after leaving the order], his remark… was a clear intimation that she ought to ask for her money back, and was a distinct invitation to her to consider her rights. She declined to do so; she preferred not to trouble about it. Under these circumstances it would, in my opinion, be wrong and contrary to sound principle to give her relief on the ground that she did not know what her rights were. Ignorance which is the result of deliberate choice is no ground for equitable relief; nor is it an answer to an equitable defence based on laches and acquiescence."

Bowen LJ was of similar view. He said –[25]

> "It is enough if she was aware that she might have rights and deliberately determined not to inquire what they were or to act upon them."

[84] The appellants bore the onus of proof on laches.

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22 (1993) 32 NSWLR 574 at 580.

23 (1887) 36 Ch D 145.

24 At 187-188.

25 At 192.

[85] Mr Gillespie was already an old man in December 2002, when Geoffrey took advantage of his vulnerability to induce him to transfer the properties to his children. He continued to be uninterested in his own financial affairs, preferring to let others attend to matters for him. The trial judge made no finding about the source of his unassertiveness and detachment – it may have been a mix of his personality, his declining physical energy and mental capacity, and a wish not to become embroiled in acrimony between his wife and the children of his first marriage.

[86] Mr Kidd, whose evidence his Honour accepted, told Mr Gillespie that if he transferred the properties to his children, he would not be able to get them back. Subsequently Mr Gillespie was informed in unequivocal terms as to what he had done. By their letter of 31 January 2003 McKays told him that he had not just made a will but actually given property away. The respondent spoke to him about it, but he shrugged his shoulders. In November 2003 Ms Luxford of the Public Trustee's Office told him that it was too late to leave the house to the respondent as he had already given it away.

[87] Geoffrey's influence over his father continued until at least mid 2003. This is evidenced by Mr Gillespie's ongoing reliance on Geoffrey to attend to his business affairs, and the trial judge's finding that Mr Gillespie's criticisms of the respondent in the July 2003 will were ideas induced by Geoffrey and without foundation.

[88] Moreover, it was the respondent who made enquiries about the possibility of having the transfers reversed, and she did not discuss the advice she received with her husband for fear of upsetting him. There is no evidence that Mr Gillespie was aware he might be entitled to have the transfer of the house reversed and deliberately chose not to inquire what his rights were or to act upon them, at least until he made the October 2005 and April 2006 wills. He had testamentary capacity in April 2006, but thereafter he was incapacitated by his advancing dementia.

[89] Counsel for the respondent submitted, somewhat faintly, that Geoffrey should be precluded from relying on an argument that Mr Gillespie should have asserted his right during his lifetime. She submitted that, in light of his evidence that he did not think he actually owned the property, Geoffrey could have been the agent or the catalyst for the relief now granted to the respondent at any time in the eight years prior to Mr Gillespie's death, and that accordingly he should be precluded from relying on such an argument. While the trial judge did not specifically comment on that aspect of Geoffrey's evidence, I think his Honour should be taken to have regarded it as disingenuous. His Honour found that the transfers of the house and the home units resulted from undue influence exerted by Geoffrey, and he did not accept that when the transfer of the house was executed the children agreed that their father could live there until he died. In short, I reject the submission.

[90] If the focus were just on Mr Gillespie's own conduct, it could not be said that he refrained from seeking redress once he knew his rights had been violated and thereby acquiesced in that violation. In my view, that remains so even when the respondent's conduct is taken into account.

[91] The respondent had Mr Gillespie's enduring power of attorney at all times from 15 January 2003. It was not revoked expressly or by her husband's subsequent execution of a power of attorney in favour of Geoffrey.

[92] It does not follow from the fact that she had the authority to take steps on her husband's behalf to have the transfers set aside that she was remiss in not doing so, or

that her failure to do so ought to be sheeted home to her husband. She was advised that it might be possible to have them reversed, but that it would be costly and protracted. Her husband had divested himself of his interest in the three properties and they were both in receipt of benefits from Centrelink, from which it should be inferred that they did not have the money to launch legal proceedings. There is no evidence that she was ever told the bases on which it might be possible to reverse the transfers or what sort of evidence would have to be gathered. There is no evidence she was ever told just what steps would have to be taken. There is no evidence that she was ever advised that the children should at least be notified by letter of a claim or possible claim. Moreover, had she taken any steps toward setting aside the transfers, she would have been acting contrary to what she believed her husband's wishes to be, at a time when he still had the requisite capacity to do so himself.

[93] I turn to the prejudice asserted by the appellants – that some evidence was no longer available and there had been an inevitable diminution in the quality of evidence that was called, that the appellants had ordered their affairs on the basis of the transfer of the house being valid, and that Annette's creditors would be prejudiced if that transfer were set aside.

[94] In *Orr v Ford*[26] Wilson, Toohey and Gaudron JJ said –

> "The question of prejudice resulting from unavailability of evidence necessarily involves some degree of speculation, but it is not a question of pure speculation. The issue is not whether evidence may have been lost but whether evidence which may have cast a different complexion on the matter has been lost."

[95] I accept the submissions of counsel for the respondent in relation to the absence of evidence from Mr Gillespie. At the time he transferred the house to his children, he was already suffering from short term memory problems. Leaving aside the respondent's evidence and Geoffrey's, this is clear from the medical evidence, as well as that of Mr Kidd. A month later, when he consulted McKays, he did not remember having assigned property. It is unlikely that, even then, his evidence would have cast a different complexion on the matter. Moreover, the 2005 and 2006 wills, though drafted with the respondent's assistance, showed what would have been the thrust of his evidence – that his children had taken undue advantage of him.

[96] In *Brisbane South Regional Health Authority v Taylor*[27] McHugh J spoke of the sometimes unrecognisable deterioration in the quality of evidence with the passage of time. Counsel for the appellants' submission to the effect that Mr Kidd could have been expected to have had a clearer recollection of his conference with Mr Gillespie had he been asked for it at an earlier time bore an attractiveness that, on reflection, was largely superficial. While he should have taken notes of the conference, the fact is he did not do so. He was a busy practitioner, and, in the absence of a file note, he could not be expected to have had a more precise recollection of the conference. He was obviously astute and experienced in advising people in Mr Gillespie's position, and the trial judge accepted not only his evidence based on his actual recollection but also that based on his customary habits.

[97] Senior counsel for the appellants submitted that they had acted to their detriment in consequence of delay in the commencement of the proceeding. However, all that was

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[26] (1989) 167 CLR 316 at 330.

[27] (1996) 186 CLR 541 at 551.

established in this regard was that Geoffrey expended some unquantified amount of his own moneys in maintenance of the house. The submission that, had they known about the claim, they may have made some provision for it in the compromise of Annette's application for the appointment of statutory trustees for sale of the three properties was speculative. The submission that they changed their positions by selling income earning properties and setting aside some of the proceeds for the maintenance of the house was an unattractive one. There was no claim for recovery of the proceeds of sale of the home units, which had been transferred to the children in the same circumstances as the house. That is relevant in weighing any prejudice to the appellants against the prejudice to Mr Gillespie's estate if the transfer of the house were not reversed. In short, the prejudice to the appellants is far outweighed by the potential prejudice to the estate.

[98] The assertion of prejudice to Annette's creditors is purely speculative. There is no evidence of the assets and liabilities of her estate, and no evidence that any creditor advanced credit on the strength of her having an interest in the house.

[99] I did not understand counsel for the respondent to pursue any argument based on the expiration of any limitation period prescribed by the *Limitation of Actions Act* 1974 (Qld).

**Conclusion**

[100] In my view the trial judge properly rejected the appellants' contention that the claim was defeated by laches.

[101] On the evidence it was not open to his Honour to conclude that Mr Gillespie knowingly acquiesced in the violation of his rights.

[102] Nor could his Honour have concluded that the respondent's failure to take steps to set aside the transfer of the house amounted to acquiescence which should be sheeted home to Mr Gillespie. The respondent held her husband's enduring power of attorney. However, she knew little about the impugned transaction beyond the fact that it had been effected, and the legal advice she received was extremely limited. Her financial resources and those of Mr Gillespie were modest. For her to have taken steps to assert Mr Gillespie's right to have the transfer set aside while he still had capacity to do so himself would have been contrary to what she believed his wishes to be, and thereafter she was fully occupied in caring for him.

[103] I would make the following orders –

1. Appeal dismissed.

2. Leave to the parties to make submissions as to the costs of the appeal in accordance with para 52 of Practice Direction No 3 of 2013.